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Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1721

ABETTA ELECTRIC SERVICE CORP.,

Petitioner,

against

LOUIS L. LEVINE, as Industrial Commissioner of the State of New York,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK

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May 17, 1974.

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK

Petitioner respectfully prays that a writ of certiorari issue to the Supreme Court of the State of New York, County of New York, to review an order of the Appellate Division, First Department, entered on October 30, 1973, which unanimously confirmed, without opinion, the respondent's determination herein, dated June 18, 1973 that the petitioner is required by section 220(3)(e) of the New York Labor Law to pay the greater prevailing rates of wages of an electrician to apprentices it employed, because it employed more apprentices than was allowed by a ratio of 1 apprentice to 3 electricians, which

was prescribed in an apprenticeship agreement between a labor union and a construction contractors' association of which the petitioner was not a member.

Opinions Below

The only opinion in the case was written by Judd D. Grey, a Hearing Officer whom the respondent assigned to conduct an administrative hearing and to transmit the evidence to the respondent with his report and recommendations on the allegations that the petitioner failed to pay to its workmen on a public work contract the prevailing rate of wages for their work. Mr. Grey's report is printed in Appendix C, *infra*, pages 4a to 15a.

No opinion was written by the Appellate Division of the New York Supreme Court in confirming the respondent's aforesaid determination, 42 A.D.2d 1050; and no opinion was written by the Court of Appeals of the State of New York on February 20, 1974, in denying petitioner's motion for leave to appeal to that Court from the aforesaid order of the said Appellate Division, —— N.Y. 2d ——.

Jurisdiction

The order of the Appellate Division of the Supreme Court of the State of New York was entered on October 30, 1973, and appears herein at Appendix E, pages 20a to 21a.

The order of the Court of Appeals of the State of New York, denying the petitioner's motion for leave to appeal to that Court, was entered on February 20, 1974, and appears herein at Appendix F pages 22a to 23a.

The jurisdiction of this court is invoked under 28 U.S.C. Section 1257 (3).

Questions Presented

1. Was the petitioner deprived of its property without due process of law, contrary to the Fourteenth Amendment to the Constitution of the United States, by respondent's determination herein which required the petitioner to pay to the apprentices whom it employed upon a public work contract the wage rates of an electrician for their work, because the petitioner employed more apprentices than was allowed by a ratio of apprentices to journeymen, which was prescribed in an apprenticeship agreement between a labor union and a contractors' association, of which the petitioner was not a member, and he did not agree to such ratio?

2. Did such administrative determination impose upon the petitioner an unconstitutional penalty, which deprived the petitioner of its property without due process of law, because section 220(3)(e) of the New York Labor Law did not authorize the imposition upon an employer of a requirement for payment of a mechanic's wage rates to apprentices who were employed in excess of an established ratio of apprentices to mechanics?

3. Was section 220(3)(e) of the New York Labor Law unconstitutionally vague, by providing for an "allowable ratio of mechanics to journeymen", without defining such "allowable ratio", and without prescribing any standards and procedures for establishment thereof?

4. Did the petitioner, as sub-contractor of the general contractor, have legal standing to maintain this proceeding?

Statement of the Case

Petitioner was the sub-contractor of Beacon Maintenance Co. Inc., and V. C. Vitanza Sons, joint venturers, on a public work contract with the New York State Health and Mental Hygiene Facilities Improvement Corporation for installation of an electric fire alarm system in buildings at Brooklyn State Hospital (4; 56).

Milton Maynard, Earl J. Phillips, and Veniel Anderson were employed by petitioner as apprentices, and they worked as such upon the contract work for installation of an electric fire alarm system at Brooklyn State Hospital, between February 2, 1972, and March 8, 1972 (230; 244-246).

Mr. Maynard became a member of Local 363 of the Teamsters Union in 1969, when he began a five-year program of apprentice training (254-255).

On March 8, 1972, while at work at Brooklyn State Hospital, Mr. Maynard asked Edward Hornidge, a Public Work Wage Investigator employed by the New York State Labor Department, how much money he should be getting for his work (244).

Mr. Hornidge examined the petitioner's records, and met with George Amerman, vice president of the petitioner, and Mr. Seamans, Mr. Hornidge's supervisor in April, 1972, when Mr. Seamans told Mr. Amerman that Local 363 of the Teamsters Union made a mistake by not registering Mr. Maynard as an apprentice, and therefore, the petitioner would have to pay to Mr. Maynard an electrician's wages for the time of his employment as an unregistered apprentice from February 2, 1972 until March 8, 1972 (153).

Mr. Hornidge told Mr. Amerman that there was money due to Mr. Maynard from the petitioner for his wages

between February 2, 1972, and March 8, 1972, consisting of the difference between the wage rate he was paid as an apprentice at $3.93 hourly, and an electrician's wage rate of $7.75 hourly, which difference he computed to be $599.00 (49-50).

Thereupon Mr. Amerman mailed to Mr. Hornidge petitioner's check to Mr. Maynard, which Mr. Hornidge gave to Mr. Maynard, and he took a receipt from Mr. Maynard, which he gave to Mr. Amerman (50-52).

Messrs. Maynard, Anderson and Phillips were laid off temporarily by the petitioner on March 8, 1972, for temporary lack of work; and they were discharged by petitioner on March 10, 1972, for engaging in an altercation at the job site where they came to collect their pay checks (16-17).

Thereafter Mr. Anderson was admitted to Local 3 of the Electrician's Union as a trainee (334-335), about a month and a half after he filed a complaint on January 31, 1973, with the New York State Labor Department that the petitioner paid him less than the prevailing rate of wages for his work on the public work contract at Brooklyn State Hospital between February 2, 1972, and March 8, 1972 (322-323).

Similar complaints were filed on January 31, 1973 by Milton Maynard, and Earl J. Phillips (52).

At some time after he was discharged by petitioner on March 10, 1972, Mr. Maynard joined the minorities training program in Local 3 of the Electricians' Union, and in September or October, 1972, he began to work for Simpson Electric, a contractor who employed only members of Local 3 (257).

Mr. Hornidge examined petitioner's payroll records, and he determined therefrom that petitioner employed appren-

tices in a ratio in excess of 1 apprentice to 3 electricians (201; 204).

Mr. Hornidge determined further that the legal effect of petitioner's employment of apprentices in a ratio in excess of 1 apprentice to 3 electricians was that section 220 (3)(e) of the New York Labor Law required the petitioner to pay to all its apprentices the $7.75 hourly wage rate plus $2.01 hourly wage supplements of an electrician, instead of the $2.50 hourly wage rate, plus $1.34 hourly wage supplements of an apprentice (93).

At a hearing before the New York State Labor Department, counsel for that Department stated that the legal effect of non compliance with a ratio of apprentices to mechanics is that the contractor is required to pay mechanic's wage rates to apprentices (203).

In his decision, the Hearing Officer said that the penalty for excessive apprentices would be payment of the journeyman's rate to apprentices (12-13).

Mr. Hornidge based the ratio of 1 apprentice to 3 electricians which he applied to petitioner's work force upon an apprenticeship agreement, dated October 19, 1971, between United Construction Contractors Association, Inc., and Local 363 of the Teamsters Union, which provided that the ratio of apprentices to journeymen is 1 to 3 (70; 220).

The petitioner was not a member of the United Construction Contractors Association (355); and he did not agree to the ratio provided in its apprenticeship agreement with Local 363 of the Teamsters Union.

All but two of petitioner's apprentices (Maynard; Maundy) were registered as apprentices with the New York State Labor Department (69; 87).

Mr. Hornidge computed the difference between the wages which petitioner paid to its apprentices on the Brooklyn State Hospital contract work, at apprentice wage rates, ranging from $2.50 to $4.50 hourly, and electrician's wage rates of $7.75 hourly; and he reported that the petitioner owed such difference to its apprentices, amounting to $32,158.74 (62-82; 90-93).

The Hearing Officer's report recommended that petitioner be ordered to pay its apprentices such difference between apprentice and electrician wage rates, amounting to $32,158.74 (18); and the determination so ordered.

Administrative Proceedings by New York State Labor Department (4).

On March 30, 1973, the New York State Labor Department notified the Contracting Agency, the Health and Mental Hygiene Facilities Improvement Corporation, to withhold $32,158.74 from money due for work under the Brooklyn State Hospital contract (6).

At petitioner's request, a hearing was held before a Hearing Officer in the New York State Labor Department, at which Mr. Hornidge testified about his investigation of the complaints of Messrs. Maynard, Anderson and Phillips, and his computation that $32,158.74 was due to petitioner's apprentices at electrician's wage rates, for employing apprentices in excess of a ratio of 1 apprentice to 3 electricians (62-93).

On June 18, 1973, the State Labor Department's Hearing Officer, Mr. Grey, made a report that for employing apprentices in excess of a ratio of 1 apprentice to 3 electricians, the contractor should be required to pay an electrician's wage rate of $7.75 hourly to such apprentices, amounting to $32,158.74, which should be deducted from money due for the contract work and paid to such apprentices (11-14; 18); and that report further recommended

that another complaint by Messrs. Maynard, Anderson and Phillips, that petitioner dismissed them in retaliation for their complaint of underpayment of their prevailing wages, should be dismissed for lack of clear evidence to support this charge (17; 18).

On the same day, June 18, 1973, the respondent made a determination which adopted and approved the Hearing Officer's report in its entirety (3-4A).

Legal Proceedings in Courts Below

On June 28, 1973, petitioner commenced a proceeding in the Supreme Court of the State of New York, County of New York, to review the respondent's aforesaid determination of June 18, 1973 (1).

Pursuant to section 7804 of the New York Civil Practice Law and Rules, the proceeding was transferred to the Appellate Division, First Department, of the New York Supreme Court, which made an order on October 30, 1973, which unanimously confirmed, without opinion, the respondent's aforesaid determination of June 18, 1973. Appendix E, *infra,* p. 20a.

On February 20, 1974, the Court of Appeals of the State of New York made an order, which denied the petitioner's motion for leave to appeal to that Court. Appendix F, *infra,* p. 22a.

Presentation of the Federal Questions

The federal constitutional questions were raised in paragraph 5 of the petition, as amended by stipulation dated August 6, 1973 (26); and they were also raised in the petitioner's reply (31). Petitioner argued such constitutional questions in its briefs to the Appellate Division of the New York Supreme Court, and its brief in support of its motion for leave to appeal to the New York Court of Appeals.

Reasons for Granting the Writ

1. The public contract for electrical work at Brooklyn State Hospital did not provide that the Contractor shall employ apprentices in any prescribed ratio. Neither the Contractor, nor the petitioner as the Sub-contractor which actually performed the contract work, had any notice that in the employment of apprentices, it would be necessary to comply with any prescribed ratio of apprentices to electricians.

The respondent's determination herein interpreted and applied section 220(3)(e) of the New York Labor Law as requiring the petitioner, in its employment of apprentices on the contract work, to comply with a ratio of 1 apprentice to 3 electricians, which was prescribed in an apprenticeship agreement between a labor union and a contractor's association of which the petitioner was not a member, and the petitioner did not agree to such ratio.

In this case, the State of New York used its State power to compel the petitioner, which was not a party to the private apprenticeship agreement between a labor union and a contractors' association, to comply with the ratio of apprentices to mechanics prescribed therein, by requiring the petitioner to pay to its apprentices the greater wage rates of an electrician, as a penalty for its non compliance with the ratio of apprentices to mechanics prescribed in such private apprenticeship agreement.

This Court has consistently held that agreements between employers and labor unions that competing employers which are not parties to such agreements shall be required to comply with standards of wages or working conditions prescribed in such agreements, constitute illegal restraints of trade under the anti-trust laws, *Allen Bradley Co.* v. *Local Union*, 325 U.S. 797 (1944); *United Mine Workers* v. *Pennington*, 381 U.S. 457 (1964); *Ram-*

sey v. *United Mine Workers,* 401 U.S. 302 (1971); *Solar Fuel Co.* v. *United Mine Workers,* 346 F. Supp. 789 (D.C. Pa., 1972), affd. 481 F. 2d 1399 (C.A. 3, 1973), certiorari denied —— S. Ct. —— (April 1, 1974).

The illegal nature of attempts to compel third parties to comply with contracts which they have not signed is not avoided by saying, as the hearing officer said in his report that section 220(3)(e) of the New York Labor Law should be interpreted and applied as imposing upon a non signer of an apprenticeship agreement, such as the petitioner herein, a statutory obligation to comply with the limitation on employment of apprentices by the ratio of 1 apprentice to 3 electricians, which was prescribed in the apprenticeship agreement between the labor union and the contractors association (11-13).

The hearing officer's report stated that while section 220(3)(e) of the New York Labor Law only required apprentices to be registered with the State Labor Department, it clearly intended that the apprentices work in the appropriate ratios (12; 13), thereby impliedly holding that this statute required non signers of an apprenticeship agreement to comply with a ratio of apprentices to journeymen provided in an apprenticeship agreement which they had not signed.

Apart from the illegal restraints of trade and competition which flow from requiring non signers of an agreement to comply with labor standards and conditions prescribed therein, a statute which requires a non signer of an agreement between private parties to comply with any of its provisions, unconstitutionally deprives such non signer of liberty and property without due process of law, contrary to the Fourteenth Amendment to the Constitution of the United States. *Carter* v. *Carter Coal Co.,* 298 U.S. 238, 311 (1935).

A statute can not constitutionally give to private parties the power to enforce by law compliance by non signers with labor standards or pricing policies which they prescribe for themselves in their private contracts.

In the *Carter* case, *supra,* it was said that a statute which attempts to give to private parties power, by private contract, to regulate the business of another, particularly a competitor, clearly deprives a non signer of such a contract of due process of law. 298 U.S. at 311.

While a statute may constitutionally give to a trade association the power to regulate standards and practices among its members, and the power to discipline its members for violation of its rules or standards of business conduct, the standards and practices prescribed by such trade association do not apply to non members thereof, whom the statute subjects to direct regulation by a governmental agency. Thus, for example, the federal securities laws provide for self-regulation of over-the-counter securities dealers by a voluntary membership association of such dealers, while non members of such association are subject to direct governmental regulation. *Johnson & Co.* v. *Securities & Exchange Commission,* 198 F. 2d 690 (C.A.2, 1952), certiorari denied 344 U.S. 855 (1952). See, also *Nassau Securities Service* v. *Securities & Exchange Commission,* 348 F. 2d 133, 136 (C.A. 2, 1965); *Sunshine Anthracite Coal Co.* v. *Adkins,* 310 U.S. 381, 388, 399 (1939); *Opp Cotton Mills* v. *Administrator,* 312 U.S. 126 (1940).

Moreover, the rules or standards of conduct adopted by such a trade association, and its administration thereof, are made subject to judicial review by statute.

In this case, the petitioner had no notice before the labor union and the contractors association agreed to the ratio of 1 apprentice to 3 electricians in their apprentice-

ship agreement; it had no opportunity to be heard on such ratio of apprentices to journeymen; and it had no opportunity to judicially review the legality and reasonableness of such ratio.

While opportunity for judicial review of administrative rules may constitutionally be given after their adoption, procedural due process requires notice, opportunity to be heard, and opportunity for judicial review at some stage before an administrative rule is enforced against a citizen. *Yakus* v. *United States,* 321 U.S. 414, 444 (1943); *Bowles* v. *Willingham,* 321 U.S. 503, 519-521 (1943).

2. The third sentence in section 220(3)(e) of the New York Labor Law provides:

> "Any employee listed on a payroll at an apprentice wage rate, who is not registered as above, shall be paid the wage rate determined by the New York State Department of Labor for the classification of work actually performed."

The determination herein interpreted and applied the above-quoted statute as authorizing the imposition of a penalty for non compliance with a ratio of apprentices to journeymen, by requiring payment of electrician's wage rates to apprentices employed in excess of a ratio of apprentices to journeymen prescribed in an apprenticeship agreement. Thus, Mr. Hornidge, the Public Work Wage Investigator, Mrs. Scherb, the counsel to the Labor Department, and the hearing officer, each said that payment of an electrician's wage rates to apprentices was authorized by the above-quoted statute, as a penalty for employment of more apprentices than was allowed by the ratio of apprentices to journeymen prescribed in the apprenticeship agreement (12-13; 93; 203).

We submit that section 220(3)(e) of the New York Labor Law prescribed no penalty whatever; and that its

provision that unregistered apprentices shall be paid "for the classification of work actually performed" only required payment of the fair market value of the work actually performed by unregistered apprentices, which was not a penalty at all, but an ordinary commercial provision requiring an employer to pay to a worker the wage rates currently being paid in the locality for his kind and grade of work, where he is employed as an unregistered apprentice.

Moreover, in this case, only two of the petitioner's apprentices (Maynard; Maundy; 69; 87) were unregistered. Yet, respondent's determination herein imposed on the petitioner, as a penalty, a requirement that it pay an electrician's wage rates to all its apprentices, and not merely to its two unregistered apprentices (4-4a).

Section 220(3)(e) of the New York Labor Law did not expressly, or by implication, provide that an employer who employs more apprentices than is permitted by a ratio of apprentices to mechanics, shall, as a penalty, pay to all his apprentices the greater wage rates of a mechanic.

Yet, that is precisely the interpretation which the hearing officer gave to section 220(3)(e) of the New York Labor Law in this case. Thus, the hearing officer's report stated (12; 13):

> "While it is certainly clear that no apprentice can be employed without registration, it would also appear from the plain reading of the statute that mere registration is insufficient. * * *
>
> * * * If there was no penalty for the violations of the apprentice ratio there would be no purpose of including the ratio provision in Section 220, subd. 3-e, or, indeed, in the agreements themselves.

> The statute clearly intended that the apprentices work in the appropriate ratios and that the penalty for excessive apprentices would be payment of the journeyman's rate for those apprentices."

Although the statute directed employers to pay the unregistered apprentices an appropriate wage rate "for the classification of work actually performed", the determination herein did not ascertain and determine any wage rate applicable to the "classification of work actually performed" by petitioner's two unregistered apprentices. Instead, the respondent determined that an electrician's wage rate should be paid to all of petitioner's apprentices for the work they actually performed, which he described as follows (14):

> "The job required the drilling of holes for the placement of conduits, the moving of conduit and the bending of pipe". See, also: 232-233; 311; 362-363.

We submit that the drilling of holes for the placement of conduits, the moving of conduit by physically carrying conduit from one floor to another, and the bending of pipe, is manual labor; and that it is not the skilled work of an electrician.

The administrative determination thus disregarded the evidence that the apprentices performed manual labor, by classifying their work as electrician's work, and requiring the petitioner to pay to its apprentices an electrician's wage rates for such work, as a penalty for its employment of more apprentices than was allowed by the ratio of 1 apprentice to 3 electricians which was prescribed by the apprenticeship agreement between the labor union and the contractors' association, of which

the petitioner was not a member, and it did not agree to such ratio.

Administrative penalties may be set aside for deprivation of property without due process of law, where a court finds that they are "unwarranted in law or . . . without justification in fact". *Butz* v. *Glover Livestock Commission Co.*, 411 U.S. 182, 185-186 (1973); *Federal Trade Commission* v. *Universal Rundle Corp.*, 387 U.S. 244, 250 (1967).

3. The second sentence in section 220(3)(e) of the New York Labor Law provides:

> "The allowable ratio of apprentices to journeymen in any craft classification shall not be greater than the ratio permitted to the contractor as to his work force on any job under the registered program."

The above-quoted statute does not define the words "allowable ratio"; it does not prescribe who shall establish such an "allowable ratio"; and it does not provide any standards, guides or procedures for establishment of an "allowable ratio of apprentices to journeymen."

Even the maximum prescribed for an "allowable ratio" by the above-quoted statute is vague and indefinite, because the statute does not say how, or by whom, there shall be established:

> "the ratio permitted to the contractor as to his work force on any job under the registered program".

The hearing officer's report, and the administrative determination herein, both dated June 18, 1973, interpreted and applied the above-quoted statute as authorizing private parties to establish an "allowable ratio" by specifying an "allowable ratio" in a private apprenticeship

agreement between themselves; and that such "allowable ratio" established by such private apprenticeship agreement was binding upon a non party to such agreement, such as the petitioner, who did not sign such agreement, and who did not agree thereto.

However, in November, 1973, five months after the respondent made his determination herein, dated June 18, 1973, for the first time, the respondent adopted "REGULATIONS GOVERNING THE REGISTRATION OF APPRENTICESHIP PROGRAMS AND AGREEMENTS", which provided, in part (12 NYCRR Part 601.5(c)(7):

> "(c) The program must contain provisions describing the following:
>
> • • •
>
> (7) *The ratio of apprentices to journeymen under the program as determined by the Commissioner,* consistent with proper supervision, training and continuity of employment, and applicable provisions in collective bargaining agreements; * * *." (emphasis supplied)

Respondent's above-quoted rule clearly recognized that the establishment of an "allowable ratio of apprentices to journeymen" was a governmental function, which should be performed by an official of the Government, and not by a private apprenticeship agreement between private parties.

Respondent's above-quoted rule also recognized that the statute lacked standards and procedures for establishment of an "allowable ratio of apprentices to journeymen" by prescribing as standards therefor "proper supervision, training and "continuity of employment", and by providing for notice and hearing preceding admin-

istrative adoption of an "allowable ratio of apprentices to journeymen".

Significantly, respondent's above-quoted rule did not provide that the ratio agreed to in a private apprenticeship agreement between a labor union and an employers' association shall be the "allowable ratio of apprentices to journeymen"; and it gave no special weight or effect to such an apprenticeship agreement, although the respondent based his determination herein solely upon such a private apprenticeship agreement.

In these circumstances, we submit that section 220(3)(e) of the New York Labor Law is unconstitutionally vague and thus deprives the petitioner of its property without due process of law, because it provides for an "allowable ratio of apprentices to journeymen" without defining such "allowable ratio", and without prescribing any standards or procedures for establishment thereof.

The hearing officer's report, and the determination herein, decided that section 220(3)(e) of the New York Labor Law impliedly authorized an "allowable ratio of apprentices to journeymen" to be established by a private apprenticeship agreement between a labor union and a contractors' association, which was binding on non members of such contractors' association, such as the petitioner, who did not agree to such ratio.

In *Carter* v. *Carter Coal Co., supra,* 298 U.S. 238, 311 (1935), the Court said that regulation of the production of coal is a governmental function, which can not be delegated by statute to private parties for regulation by collective bargaining agreements between representatives of a majority of the coal miners and a majority of the mine owners.

Here, too, the establishment of a ratio of apprentices to mechanics, as a limitation upon employment of appren-

tices, is a governmental function, which can not constitutionally be delegated to private parties for establishment by their private apprenticeship agreement.

4. The petitioner, as sub-contractor of the general contractor, has legal standing to maintain this proceeding Moreover, the general contractor joins in this petition for certiorari.

In its brief in the Appellate Division of the New York Supreme Court (pp. 16-17), the respondent argued that the petitioner, as sub-contractor of the general contractor, has no standing to seek judicial review of the respondent's determination. The petitioner, as subcontractor, was united in interest with the Contractor herein, so that his participation in the administrative hearing, and in the judicial review of the administrative determination was on behalf of the Contractor, as well as on its own behalf.

The hearing officer's report stated that the petitioner participated in the administrative hearing as the subcontractor of Beacon Maintenance Co. Inc. and V. S. Vitanza Sons, joint venture, which was the general contractor (7). Mr. Hornidge, the respondent's Public Work Wage Investigator, testified (56):

> "The subcontractor for the electrical work was Abetta Electric";

and he found the petitioner at the site doing the contract work (56-57). This was alleged in the petition herein (par. 1, p. 21), and it was expressly admitted in the answer (par. FIRST, p. 27).

Section 220-b(2) of the New York Labor Law provides for withholding:

> "* * * from any payment on account thereof, due the contractor *or subcontractor* executing said public

> improvement, sufficient moneys to satisfy said wages * * *." (emphasis supplied)

The pleadings admitted, and respondent's investigator Mr. Hornidge testified, without dispute, that the petitioner was the "subcontractor executing said public improvement" within the meaning of the statute, which provided that notice of hearing shall be given to:

> "* * * all interested persons, including the person complained against * * *";

and that an Article 78 proceeding to review the determination may be "commenced by any person aggrieved thereby".

The petitioner, as sub-contractor, employed Messrs. Maynard, Phillips and Anderson, who complained to respondent on January 31, 1973, asking payment of an electrician's wage rates because petitioner employed more apprentices than was allowed by the ratio of 1 apprentice to 3 electricians provided in the apprenticeship agreement between a labor union and a contractors' association; and the hearing officer so reported (5). Therefore, as "the person complained against", the petitioner clearly had standing to participate in the administrative hearing, and to seek judicial review of the administrative determination.

As the "subcontractor executing said public improvement", whose money the statute authorized to be withheld, the petitioner also clearly was a "person aggrieved" by the determination, who thus had legal standing to maintain this proceeding for judicial review of such administrative determination.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

May 17, 1974.

Respectfully submitted,

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APPENDIX A

New York Labor Law, section 220, subdivision 3(e)

New York Labor Law, section 220, subdivision 3(e):

> "Apprentices will be permitted to work as such only when they are registered, individually, under a bona fide program registered with the New York State Department of Labor. The allowable ratio of apprentices to journeymen in any craft classification shall not be greater than the ratio permitted to the contractor as to his work force on any job under the registered program. Any employee listed on a payroll at an apprentice wage rate, who is not registered as above, shall be paid the wage determined by the New York State Department of Labor for the classification of work he actually performed. The contractor or subcontractor will be required to furnish written evidence of registration of his program and apprentices as well as of the appropriate ratios and wage rates, for the area of construction prior to using any apprentices on the contract work."

APPENDIX B

New York Labor Law, section 220-b, subdivision 2

New York Labor Law, section 220-b, subdivision 2.

> "When any interested person shall file a written complaint with the fiscal officer, as herein defined, alleging unpaid wages or supplements due for labor, performed on a public improvement for which a contract has been entered into, and said labor is alleged to have been performed within the three-year period immediately preceding the date of filing of said complaint, or if, on the fiscal officer's own initiative, unpaid wages or supplements appear to be due, the fiscal officer shall immediately so notify the financial officer of the civil division interested, who shall withhold from any payment on account thereof, due the contractor or subcontractor executing said public improvement, sufficient moneys to satisfy said wages, and supplements, pending a final determination. The fiscal officer shall then cause an investigation to be made to determine whether any amounts are due to the laborers, workmen or mechanics, or on their respective behalves, on such public improvement, for labor performed after the commencement of the three-year period immediately preceding the filing of the complaint or the commencement of the investigation on his own initiative, as the case may be, and shall order a hearing thereon at a time and place to be specified and shall give notice thereof, together with a copy of such complaint, or a statement of the facts disclosed upon such investigation, which notice shall be served personally or by mail on all interested persons, including the person complained against and upon

the financial officer of the civil division interested; such person complained against shall have an opportunity to be heard in respect to the matters complained of, at the time and place specified in such notice, which time shall be not less than five days from the service of said notice. The fiscal officer in such an investigation shall be deemed to be acting in a judicial capacity and shall have the rights to issue subpoenas, administer oaths and examine witnesses. The enforcement of a subpoena issued under this section shall be regulated by the civil practice law and rules. Such investigation and hearing shall be expeditiously conducted, and upon such hearing and investigation, the fiscal officer shall determine the issues raised thereon and shall make and file an order in his office stating such determination and forthwith serve a copy of such order, either personally or by mail, together with notice of filing, upon the financial officer of the civil division interested and the parties to such proceedings and, if the fiscal officer be the comptroller or other analogous officer of a city, upon the industrial commissioner. Upon the entry and service of such order, the financial officer of the civil division interested shall pay to the claimant, from the moneys due to the contractor or subcontractor, the amount of the claim as determined by the fiscal officer provided that no proceeding pursuant to article seventy-eight of the civil practice law and rules for review of said order is commenced by any party aggrieved thereby within thirty days from the date said order was filed in the office of the fiscal officer. In the event that such a proceeding for review is instituted, moneys sufficient to satisfy the claim shall be set aside by the financial officer interested, subject to the order of the court."

APPENDIX C

Report of the Hearing Officer, Judd D. Grey

HEARING OFFICER'S REPORT AND RECOMMENDATIONS

To: HON. LOUIS L. LEVINE, Industrial Commissioner of the State of New York.

1. This was a proceeding under Article 8 of the Labor Law alleging non-payment of wages and supplements due on a public work project.

2. On March 8, 1972, one of the claimants, Milton Maynard, complained to a Public Work Investigator at the job site (Brooklyn State Hospital) that he was not receiving the prevailing wage or prevailing supplements. The investigator informed the foreman on the job that the claimant was entitled to payment at the journeymen electrician's rate. The amount due the claimant for wages was paid by the employer and the matter was considered closed.

3. On January 31, 1973 the claimants alleged that they were terminated by their employer as a result of their complaints to the Department of Labor on March 8, 1972.

4. On or about February 5, 1973, after receipt of the complaints alleging non-payment and discrimination, the Bureau of Public Work conducted an investigation and as a result of the investigation it was found that the number of apprentices on the project far exceeded the ratio of apprentices permitted under the apprenticeship training agreement entered into between Local 363 and its contractors; said agreement having been registered

with the New York State Department of Labor Apprenticeship Training Program.

5. On or about March 30, 1973, a notice to withhold monies due for wages and supplements were served upon the Health and Mental Hygiene Facilities Improvement Corporation, the contracting authority in this case.

6. You ordered a hearing on the issues and instructed me to serve as hearing officer. A Notice of Hearing was sent to all interested parties on April 3, 1973.*

Hearings were held on April 23, May 3 and May 9, 1973. Present at the hearings were: Joan B. Scherb, Senior Attorney, Department of Labor; N. George Turchin, Esq., attorney for Abetta Electric Service Corporation, the sub-contractor on this project; Mr. George Amerman, vice-president of Abetta Electric Service Corporation; Mr. Milton Maynard, Mr. Earl J. Phillips and Mr. Veniel Anderson, claimants; Mr. Harold Stern, Mr. Edward Hornidge and Mr. Charles Drobner, represented the Bureau of Public Work.

THE HEARING

Mr. Edward Hornidge testified that on a routine investigation of the Brooklyn State Hospital job on March 8, 1972 he was advised by the project engineer that one of the men complained that he was not receiving prevailing wages or prevailing supplements. He asked that the

* Although Notice of Hearing was sent to the general contractor, Beacon Maintenance Co., Inc. and V. C. Vitanza Sons at 2300 West 7th Street, Brooklyn, New York, the general contractor neither appeared in person or by attorney at any of the hearings.

man be brought to him and after hearing the complaint of Mr. Milton Maynard, an electrician on this job, he advised the foreman, Mr. Sam Ross, that Maynard was entitled to the prevailing wage for journeymen electricians. The employer was notified and after payment of the amount due the investigation was closed.

On or about January 31, 1972, Maynard and two other claimants, Earl J. Phillips and Veniel Anderson, filed written affidavits with the Industrial Commissioner alleging non-payment of wages and supplements and further alleging that on March 8, 1972 their employment was terminated as a result of the prevailing wage complaint filed by Maynard.

A second investigation was initiated by the Bureau of Public Work and all the payroll books and records of the employer on the Brooklyn State Hospital project were requested. As a result of this investigation, the Public Work Investigator testified that the ratio of apprentices to journeymen electricians on this job far exceeded the prescribed ratio in the apprenticeship agreement, which was one apprentice for every three journeymen. As a result of the excessive apprentices and in conformity with Section 220, subd. 3-e of the Public Work Law, the Investigator prepared a document consisting of some 78 pages showing the amount paid to each apprentice and calculated the underpayment for each apprentice based upon the statute which provides that apprentices shall work in the prescribed ratio under a Department interpretation and apprentices shall be paid the wage rate determined by the New York State Department of Labor for the classification of the work actually performed where the ratio exceeded the apprentices permitted in the agreement.

As a result of such calculation, it was determined that there was due workmen, laborers and mechanics some

$32,000 in underpayments of wages and supplements. There was no dispute as to the calculation or the amount involved, rather the attorney for the sub-contractors has objected on the ground that Section 220, subd. 3 does not provide journeymen's rate for excessive apprentices and on the further ground that this was an alteration job and the proper rate should have been the rate paid to all "M" mechanics for alteration work (said rate being $5.25 per hour) rather than the journeymen electrician's rate ($7.75 an hour).

Mrs. Scherb, representing the Bureau of Public Work took the position that since the contract itself (Department Exhibit 4) provided in Addendum No. 2 for a change in the wage scale for journeymen electricians to $7.75 an hour and $2.01 per hour for supplements, and that wage schedule having been approved by the general contractor, Louis Vitanzi on September 22, 1971 and such contract having been entered into by the general contractor on October 27, 1971, the journeymen electrician's rate was binding on all parties. In addition, the statute itself, Section 220, subd. 3, provides that any person or corporation that wilfully pays or provides after entering into such contract less than such stipulated wage schedule or supplements as established by the fiscal officer shall be guilty of a misdemeanor. Moreover, that the rate in the wage schedule was required under Section 220, subd. 3-a to be posted in a prominent place by every contractor and every sub-contractor of a public work project and, therefore, the general contractor having contracted with the State for a specified rate is bound by such rate.

Mr. Turchin argues that there is no evidence that the change in the wage schedule to $7.75 an hour was ever communicated to the general contractor or the sub-contractor (pp. 41 and 42 of minutes). This contention must

be rejected out of hand since the contract itself indicates an acknowledgement of change of the wage schedule by the general contractor on September 22, 1971. With respect to the sub-contractor, under Section 220, subd. 3-a the sub-contractor is chargeable with knowledge of the wage schedule called for in the contract and, in fact, the onus is placed upon him to post such wage schedule in a prominent and accessible place on the job site itself.

Mr. Turchin further argues that this was not, in fact, a construction project or "new work" but an alteration project and, therefore, the wage schedule was inaccurate. The rate should have been the "M" journeyman's rate of $5.25.

It should be noted that on public work projects no distinction in the statute is made between alteration work or construction work nor is there any provision for payment of an amount other than that called for in the wage schedule under the contract. I am constrained to agree with the position of counsel for the Bureau of Public Work (see page 4 of the Reply Memorandum) that once a contractor signs and accepts a contract with the State and performs the work he cannot later be heard to complain that the wage schedule to which he agreed is inaccurate or should be reduced. This proceeding, of course, is against both the general contractor and the sub-contractor. The general contractor under Section 223 of the Public Work Law is held to a standard of strict liability for any dereliction on the part of the sub-contractor.

I would, therefore, conclude that the rate for journeyman electrician on this project was $7.75 an hour in wages and $2.01 per hour in supplements.

Turning to the question of apprentices Counsel for the Bureau of Public Work argues that the excessive number

of apprentices constitutes a violation of Section 220, subd. 3-e of the Labor Law, which provides in pertinent part:

> "Apprentices will be permitted to work as such only when they are registered, individually, under a bona fide program registered with the New York State Department of Labor. The allowable ratio of apprentices to journeymen in any craft classification shall not be greater than the ratio permitted to the contractor as to his work force on any job under the registered program. Any employee listed on a payroll at an apprentice wage rate, who is not registered as above, shall be paid the wage rate determined by the New York State Department of Labor for the classification of work he actually performed. The contractor or subcontractor will be required to furnish written evidence of the registration of his program and apprentices as well as of the appropriate ratios and wage rates, for the area of construction prior to using any apprentices on the contract work."

It should be noted that Section 220-3-e provides that such apprentices shall be permitted to work as such only when they are registered individually under a bona fide program registered with the New York State Department of Labor. The Counsel for the sub-contractor argues that registration is the only requirement of the statute and that Section 220, subd. 3-e provides no penalty for apprentices in excess of the permissive ratio. While it is certainly clear that no apprentice can be employed without registration, it would also appear from the plain reading of the statute that mere registration is insufficient. The purpose of providing ratios for apprentices is twofold. First, to insure that there are sufficient journeymen to train and oversee the work of the apprentices on the project, and

second, to insure that the future needs for journeymen in the industry are met.

Finally, the requirement of limiting the apprentices was to insure that excessive apprentices were not used in public work since such apprentices could operate to reduce illegally, the number of journeymen on a public work job and also could give an unfair competitive advantage in labor costs to those contractors who avoid adherence to the ratio and an unfair competitive disadvantage to those contractors who abide by the apprentice ratio agreements. It has been the overall purpose of the Public Work Law to provide through wage schedules and apprentice ratios that all contractors shall bid on a public work job on an equal basis with respect to labor costs. If there was no penalty for the violations of the apprentice ratio there would be no purpose of including the ratio provision in Section 220, subd. 3-e. Or, indeed, in the agreements themselves.

The statute clearly intended that the apprentices work in the appropriate ratios and that the penalty for excessive apprentices would be payment of the journeyman's rate for those apprentices.

There was some conflict over what trade performed the work on the project. Mr. Hornidge, over objection, testified that the work performed on this project was that of the electrician's trade. He further testified that from years of experience in the construction industry, he knew what work was performed by electricians and he knew that apprentices were trained on the job by journeymen and received theoretical training at evening classes several times a week for a period of four years. He further testified that he was familiar with the ratio of apprentices to journeymen electricians in the locality and that the

ratio was one apprentice for each three journeymen. All apprentices with the exception of Milton Maynard and Desmond Maundy were registered under a bona fide program for electricians, and all other apprentices were registered as electricians' apprentices by Local Union 363.

Mr. Maynard testified that he had worked as an electrician for some ten years and had received training at various schools and institutes. He was physically present on the job and had three apprentices working with him. The job required the drilling of holes for the placement of conduits, the moving of conduit and the bending of pipe (p. 233 of the minutes). Mr. Maynard also observed the work performed by other apprentices on this project and such work was the same work performed by Maynard and his apprentices. Anderson and Phillips testified substantially as Maynard with respect to the work performed.

Mr. George Amerman, Vice-President of Abetta Electric Services Corporation, agreed that the men were drilling holes, moving conduit and bending pipe. Mr. Amerman, however, stated that ordinarily electricians did not drill holes or move material, this he proclaimed was the work of material men or laborers. It should be noted that the wage rate for material men or laborers was substantially below that of journeymen electricians, and of course the sub-contractor in this case has a financial interest in the outcome of this litigation. If, in fact, this is laborers' work the contractor's liability will be substantially reduced. Moreover, on cross-examination Mr. Amerman admitted that electricians sometimes move conduit, that electricians sometimes drill holes, although he felt that this was not their ordinary duty.

Appendix C

Mr. Weinstein, an electrical contractor with numerous years of experience was called by the Department. His testimony was that the work performed on this project was the work of a journeyman electrician. He made no concession in his cross-examination and had no pecuniary interest in the outcome of this litigation. Upon all the facts and testimony in the record, it is difficult to escape the conclusion that the work performed on this job is the work of a journeyman electrician.

Mr. Bruce Earl, the Apprenticeship Training Representative of the Department of Labor, testified that the apprentice ratio was established by management and labor for the particular industry in the particular locality where the program existed (p. 215 of the minutes). He further testified that the apprentice ratio was established by the master agreement, and that Local 363 by its Master Apprentice Training Program (p. 219 of the minutes) (Department's Exhibit 18), agreed to an apprentice ratio of one apprentice for every three journeymen in that locality. On the record it is clear that the work was that of a journeyman electrician.

The discrimination complaint wherein three employees charged they were terminated or discharged as a result of their having filed a complaint with the Industrial Commissioner can be resolved only upon the fact and testimony on the record. There was a sharp conflict of testimony regarding Maynard, Phillips and Anderson version of their "termination" and that of George Amerman, Vice-President of Abetta Electric Service Corporation. Maynard, Phillips and Anderson testified that they were terminated on March 8, 1972 at about 3 p.m. in the afternoon, not more than half an hour after the Public Work Investigator informed Mr. Ross that there were due May-

nard some $600 in prevailing wages. Ross apparently called the men together and told them that they were "laid off" because they were non-productive. All three employees understood that the layoff was permanent and, in fact, tantamount to firing. Amerman, on the other hand, testified that on March 8, 1972 he instructed the foreman to lay off four men because there was no work available and he had no other jobs to transfer these men to. The layoff was temporary and on March 8, 1972 Amerman claimed to know nothing of any prevailing wage complaint. It is his position that the layoff was temporary and necessitated by the demands of the work schedule. On March 10, 1972 the men were to report to pick up their pay checks. On that date there was "an altercation" between Phillips and Ross. Phillips testified that the foreman, Ross, threw his check on the ground and as a result words were exchanged. Amerman claims Phillips put his hand in his pocket and made a threatening gesture, whereupon Amerman restrained Phillips until he determined that he had no weapon. The other complainant, Anderson, came running down the hall to restore law and order according to Amerman's testimony (p. 370 of the minutes), when a security guard jumped on his back from behind. Anderson struggled to get free and he and the guard grappled on the floor. Anderson apparently was unable to see the man or know that he was a security guard. Anderson was then arrested and booked at the police station. After the booking, Amerman claims he fired all three men as a result of the altercation on March 10, 1972. Amerman also claims that he believes Maynard struck the security guard. Maynard denies this and claims that he had no part whatever in the altercation. On cross-examination it was established that Anderson did not participate in the al-

tercation and he apparently was attempting to protect Amerman (p. 390 of the minutes), yet Anderson was also discharged.

Be that as it may, the employer is charged with a misdemeanor and the facts of the violation must be established beyond a reasonable doubt if this matter is to be prosecuted successfully. That burden, in my opinion, has not been met. There is no clear evidence that Amerman was aware of the prevailing wage complaint. In fact, the Investigator states he brought the complaint to Amerman's attention in March of 1972 after the discharge. There is a suggestion of Amerman that there was some "bad feeling" between the complainants and the foreman. However, this is hardly sufficient to establish discrimination under Section 215 of the Labor Law. I am inclined to believe that the men were discharged as a result of altercation on March 10, 1972 and not in retaliation by the employer for filing a wage complaint.

RECOMMENDATION

I RECOMMEND that a determination be made that there is due from Abetta Electric Service Corporation and Beacon Maintenance Co., Inc.—V. C. Vitanzi Sons (Joint Venturers) to the laborers, workmen and mechanics listed on the attached Schedule I the amounts set forth opposite each of their names and

I RECOMMEND that an order be filed in the office of the Department of Labor directing the Comptroller of the State of New York to pay the aforesaid amounts out of any funds withheld by such financial officer from Beacon Maintenance Co., Inc.—V. C. Vitanzi Sons (Joint Venturers).

Appendix C

I FURTHER RECOMMEND that those portions of the complaints filed by Milton Maynard, Earl J. Phillips and Veniel Anderson alleging that they were discriminated against for filing a wage complaint with the Industrial Commissioner under Section 215 of the Labor Law be dismissed.

JUDD D. GREY
Hearing Officer

Dated: Albany, New York,
June 18, 1973.

APPENDIX D

Respondent's Determination, dated June 18, 1973

RESPONDENT'S DETERMINATION, SUBJECT TO JUDICIAL REVIEW

STATE OF NEW YORK
DEPARTMENT OF LABOR

In the Matter of the Claims for Supplements filed by:

MILTON MAYNARD, EARL J. PHILLIPS and VENIEL ANDERSON, *et al.*,

—against—

ABETTA ELECTRIC SERVICE CORPORATION and BEACON MAINTENANCE CO., INC.—V. C. VITANZI SONS, A Joint Venture

---

This was a proceeding under Article 8 of the Labor Law covering the alleged non-payment of wages and supplements to workmen, laborers and mechanics on a public work project at Brooklyn State Hospital. The proceeding also covered complaints of alleged discrimination under Section 215 of the Labor Law.

Pursuant to my direction, Judd D. Grey, Deputy Industrial Commissioner, New York State Department of Labor, held hearing on the matter on April 23, May 3 and May 9, 1973. The Hearing Officer has submitted his report containing his findings and recommendations. I approve his report and adopt his findings and recommendations.

Appendix D

NOW, THEREFORE, upon the entire record of this proceeding

IT IS DETERMINED that there is due the claimants listed on Schedule I attached hereto, for wages and supplements on said public work project the sums set forth on said schedule opposite each of their names, and

IT IS DETERMINED that that portion of the complaints alleging discrimination under Section 215 of the Labor Law be DISMISSED, and

IT IS ORDERED that the Comptroller of the State of New York pay to the claimants listed in Schedule I the individual sums set forth opposite each name; and said payments are to be made from monies withheld by the State Comptroller from payments due Beacon Maintenance Co., Inc.—V. C. Vitanzi Sons (Joint Venturers) on Contract No. 24887-E, between the New York State Health and Mental Hygiene Facilities Improvement Corporation and Beacon Maintenance Co., Inc.—V. C. Vitanzi Sons, A Joint Venture, unless an appeal from the within order is taken within thirty (30) days of this date.

LOUIS L. LEVINE
Industrial Commissioner

Dated: New York, New York,
June 18, 1973.

Appendix D

SCHEDULE I

Contract: Fire Alarm & Sprinkler System—Bklyn. St. Hosp.—Spec. No. 24887-E (PRC. 71-2911)

Prime Contr: Beacon Maintenance Co., Inc.—V. C. Vitanza Sons

SubContr: Abetta Electric Service Corp.

Employee	*Wage and/or Supplement Due*
Accardo, Ralph	$ 16.19
Anderson, Veniel	943.60
Bellantoni, Vincent	625.22
Brown, Rufus	25.95
Connelly, Wallace	373.13
Davis, Dennis	82.91
Dickerson, Melvin	266.68
Forte, Anthony	83.42
Fox, Timothy	1,796.38
Gordon, Fred	22.08
Greenfield, William	210.58
Lattibeaudier, Jos.	62.71
Goforth, Eugene	36.48
Maundy, Desmond	642.98
Maynard, Milton	300.59

Appendix D

Employee	*Wage and/or Supplement Due*
Muscatella, Anthony	6,776.36
Muscatella, Chris	2,014.28
Perine, Gary	2,524.76
Phillips, Errol	861.74
Piazza, Danny	2,627.78
Roland, Gene	2,355.95
Ross, Sam	51.06
Simone, Vincent	2,040.47
Spallino, Vincent	2,450.65
Wong, Neville	4,966.79
Total	$32,158.74

APPENDIX E

Order of the Appellate Division, Appealed From

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on October 30, 1973.

Present—Hon. Owen McGivern, Justice Presiding

Arthur Markewich
Myles J. Lane
George Tilzer
Louis J. Capozzoli, Justices.

In the Matter of the Application

of

Abetta Electric Service Corp.,

Petitioner,

for a judgment pursuant to Article 78 CPLR,

—against—

Louis L. Levine, as Industrial Commissioner of the State of New York,

Respondent.

7629

Appendix E

The above-named petitioner having moved at Special Term of the Supreme Court, New York County, pursuant to Article 78 of the Civil Practice Law and Rules, for a review by the court of a determination of the respondent dated June 18, 1973, under § 220-b of the Labor Law, that the petitioner failed to pay the full prevailing rate of wages and supplements to its employees on a public work contract and directed withholding $32,158.74 from money payable for contract work and payment thereof to petitioner's employees,

And this proceeding having been transferred by order of said court, entered on August 9, 1973 to this Court for review and determination,

And said proceeding having duly come on to be heard before this Court and having been argued by Mr. Morris Weissberg of counsel for the petitioner, and by Mr. A. Seth Greenwald of counsel for the respondent; and due deliberation having been had thereon,

It is unanimously ordered that the determination of the respondent be and the same hereby is confirmed, and that the respondent shall recover of the petitioner $60 costs and disbursements of this proceeding.

ENTER:

HYMAN W. GAMSO
Clerk.

APPENDIX F

Order of New York Court of Appeals, Denying Leave to Appeal

STATE OF NEW YORK

IN COURT OF APPEALS

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the twentieth day of February, A.D., 1974.

Present,

HON. CHARLES D. BREITEL,
Chief Judge, presiding.

Mo. No. 13

In the Matter of the Application of

ABETTA ELECTRIC SERVICE CORPORATION,

Appellant,

for a judgment &c.

vs.

LOUIS L. LEVINE, as Industrial Commissioner of the State of New York,

Respondent.

A motion for leave to appeal to the Court of Appeals in the above cause having been heretofore made upon

the part of the appellant herein and papers having been duly submitted thereon and due deliberation thereupon had:

ORDERED, that the said motion be and the same hereby is denied.

[SEAL]

A copy

JAMES M. FLAVIN
Clerk

Supreme Court of the United States

OCTOBER TERM, 1973

Supreme Court, U. S.
FILED
JUN 17 1974
MICHAEL RODAK, JR., CLERK

No. 73-1721

ABETTA ELECTRIC SERVICE CORP.,
Petitioner,

against

LOUIS L. LEVINE, as Industrial Commissioner of the State of New York,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO CERTIORARI

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249 Press of Fremont Payne, Inc., 417 Canal St., N. Y.—966—6570

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FEDERAL

40 U.S.C. § 276-a 2

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1721

ABETTA ELECTRIC SERVICE CORP.,
Petitioner,

against

LOUIS L. LEVINE, as Industrial Commissioner of the State of New York,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO CERTIORARI

Opinion Below

The decision after a hearing of the respondent is found at Petition (p. 16a), after a Report by the Hearing Officer (4a).* In the New York courts this case is reported at 42 A.D.2d 1050, 348 N.Y.S. 2d 955 (1st Dept., 1973), where the Appellate Division confirmed the respondent's order without opinion. The Court of Appeals of the State of New York denied a motion for leave to appeal, 34 N.Y.2d 513 (February 20, 1974).

* This was based on an extensive hearing pursuant to statute. Numbers in parentheses refer to Petition's appendix.

Statement of the Case

The petitioner, Abetta Electric Service Corp., brought this proceeding to review a determination by the respondent, the Industrial Commissioner of the State of New York, requiring that $32,158.74 be paid employees on a public work project. The deduction was from the prime contractor, Beacon-Vitanzi. The matter originated on a complaint that petitioner, a subcontractor of Beacon-Vitanzi, had failed to pay the prevailing rate of wage to several of its employees. The latter were working for Abetta on a public work project at Brooklyn State Hospital, Brooklyn, N. Y. for the State Health and Mental Hygiene Facilities corporation.

State law, Labor Law, Art-8, required payment of the prevailing rate of wage on all public works projects.* The petitioner was doing electrical work on such project.

So far as relevant apprentice electricians were hired for the project in a ratio exceeding the program allowances. N. Y. Labor Law § 220, subd. 3-e. Where the program required three journeymen for each apprentice (Local Union 363 program), Abetta used approximately one journeyman for each apprentice. A necessary result was much lower wages for the workmen and labor costs on the project. An investigation was made by the State, charges filed and a hearing held on some $32,000 in underpayments of wages and supplements.

The hearing officer ruled on several legal objections, none of them of a constitutional nature. None others were presented. Thus he found the rate of a journeyman electrician to be $7.75 per hour in wages and $2.01 per hour in supplements, rather than a lower "M" or modification

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* The Government has a similar statute and requirement, 40 U.S.C. § 276a.

rate argued for by Abetta. The work done was found to be that of a journeyman electrician. It was also determined that the penalty for excessive apprentices on a public work project would be the payment of the journeyman's rate for those apprentices (10a). The respondent confirmed the recommendation and award (16a).

Thereafter petitioner instituted a proceeding pursuant to Article 78 of the New York Civil Practice Law and Rules (CPLR) to review the determination. The Appellate Division, to which the procedure had been transferred, confirmed the determination (no opinion). After the Appellate Division denied leave to appeal, a motion for leave to appeal directed to the Court of Appeals was also denied.*

At this point, since all appeals had been exhausted, the respondent released the moneys withheld and paid them to the individuals involved. Thus the matter is moot and petitioner never moved for a stay in the courts below or this Court.

Reasons for Denying Certiorari

A. The petition raises issues that were never before the Courts below.

The petitioner alleges it raised constitutional issues in his amended petition and reply (Pet. p. 8). However it never raised them in the administrative proceeding before the respondent. Under New York practice, an objection on constitutional grounds must be raised at the administrative hearing or the objection is not available. *Matter of Leogrande* v. *State Liquor Authority*, 19 N.Y.2d 418, 424, 280 N.Y.S. 2d 381, 227 N.E. 2d 302 (1967). Thus it is clear where the hearing officer had no constitutional claim

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* It should be noted that an appeal to the Court of Appeals lies as of right when a constitutional issue is presented. CPLR 5601(b).

before him, the state court did not either. The Supreme Court cannot review an issue not properly raised below.

The petition here fails to state what "constitutional questions" were purportedly raised below. Actually the argument in the brief herein is entirely different from the argument below, as to violation of the federal anti-trust policy. From the papers petitioner now presents it is obvious that the alleged "constitutional" issues were afterthoughts, raised not at the hearing or the original Article 78 petition. The petition herein contains additional afterthoughts.

Finally the petitioner moved for permission to appeal, CPLR 5602, presumably because it was seeking to appeal from an order of the Appellate Division, which was not appealable as of right. 5602(a)(1)(i). As such the motion for leave to appeal was directed to the Court of Appeals' discretion. If there really was a constitutional issue, or so petitioner thought, it could have appealed to the Court of Appeals, as of right, CPLR 5601(b)(1). Failure to take an appeal as of right indicates the lack of any constitutional issue in this matter. If the petitioner wanted to preserve or show that a constitutional issue was raised the normal method is to move to amend the remittitur. *Cf. McKay* v. *Stewart,* 29 N.Y. 2d 746 (1971), *cert. denied,* 405 U.S. 1040 *sub nom. Cecire* v. *Stewart.*

B. No substantial constitutional issue is presented.

Assuming, *arguendo,* there was some constitutional issue properly presented below, the petitioner fails to present any substantial constitutional issue worthy of consideration by this Court.

Petitioner was a sub-contractor on a public works project. As such it was required to pay the prevailing rate of wages to workers on the project. New York Labor Law, Article 8, § 220 *et seq.* It was not required to pay

such wages on other work it performed. Thus petitioner's discussion of illegal restraints of trade, Br. pp. 9-11, is woefully besides the point. Cases involving union contracts purporting to bind outside employers in the conduct of their business have nothing to do with public works contracts. Contrary to *Carter* v. *Carter Coal Co.*, 298 U.S. 238 (1935), this Court in *United States* v. *Darby*, 312 U.S. 100, 123 (1941), upheld the Fair Labor Standards Act of 1938 and limited *Carter*. *Darby* recognized the government's right to suppress production of goods under substandard labor conditions. In essence petitioner herein asked to be freed from provisions of state law while still retaining the benefits of doing public work. In short, it seeks to unfairly compete on said project. Of course, this is wrong. If petitioner can use low-cost labor on public work without penalty, it obtains an unfair competitive advantage.

Claimed lack of notice of the allowable apprentice ratio (Br. p. 9) is irrelevant because the contractor (Beacon-Vitanzi) was bound and never appeared to contest this. Use of subcontractors can be a strategem to evade the law. Actually the money involved here was withheld from the contractor, not the subcontractor. As the hearing officer (8a) said, "(t)he general contractor under Section 223 of the Public Work (sic.—actually 'Labor') Law is held to a standard of strict liability for any dereliction on the part of the subcontractor."

The petitioner ignores the valid purpose of the statute which had been summed up as follows:

> "The present statute is an attempt by the State to hold its territorial subdivisions [and itself] to a standard of social justice in dealing with laborers, workmen and mechanics. It is to be interpreted with a degree of liberality essential to the attainment of the end in view." *Austin* v. *City of New York*, 258 N.Y. 113, 117, 179 N.E. 313 (1932), per CARDOZO, J.

And similarly, see *Bucci* v. *Village of Port Chester*, 22 N.Y. 2d 195, 201, 292 N.Y.S. 2d 393 (1968).

In requiring registration of apprentices when used on public work, the statute § 220, subd. 3-e, furthers the purpose of paying a prevailing wage. As the hearing officer said (10a):

> "Finally, the requirement of limiting the apprentices was to insure that excessive apprentices were not used in public work since such apprentices could operate to reduce illegally, the number of journeymen on a public work job and also could give an unfair competitive advantage in labor costs to those contractors who avoid adherence to the ratio and an unfair competitive disadvantage to those contractors who abide by the apprentice ratio agreements. It has been the overall purpose of the Public Work Law to provide through wage schedules and apprentice ratios that all contractors shall bid on a public work job on an equal basis with respect to labor costs. If there was no penalty for the violations of the apprentice ratio there would be no purpose of including the ratio provisions in Section 220, subd. 3-e. Or, indeed, in the agreements themselves."

The subcontractor here, the petitioner was in total nonconformity with the statute. The ratio, 1 to 3, was part of the "prevailing rate of wage" since nonadherence lowered the wage scale. The apprentices employed were registered with a program requiring such a ratio. Indeed no other ratio was ever suggested.

Finally petitioner never furnished "written evidence of the registration of *his* program and apprentices as well as the appropriate ratio and wage rates, for the area of construction prior to using any apprentices on the contract work." Last sentence of Labor Law, § 220, subd. 3-e

(emphasis supplied). Absent such compliance no apprentice labor was properly used on the job. There obviously has to be some penalty and payment of journeyman wages for the work, ruled to be that of a journeyman electrician, was proper.

C. There is an independent, adequate state ground to deny certiorari.

In view of petitioner's failure to conform to § 220, subd. 3-e, as noted *supra*, it could not use apprentices on the *public* work, regardless of whether there is a constitutional issue on notice of the appropriate ratio. Failure to comply with the statute in any way is an independent, adequate state ground. This Court will not review state court judgments which rest upon independent, adequate state grounds, even where those judgments also decide federal questions. *Department of Mental Hygiene* v. *Kirchner*, 380 U.S. 194, 198 (1965); *Henry* v. *Mississippi*, 379 U.S. 443, 446 (1965); *Jankovich* v. *Toll Road Commission*, 379 U.S. 487, 489 (1965).

The issues in this case were simply the rate of pay and the sanction for failure to properly pay apprentices. The respondent found that the petitioner had failed to pay its employees properly. Simple justice demanded that sufficient money be deducted from the contractor's* payments to provide the workers with their due.

The petitioner continues to argue, even before this Court, substantiality of the evidence and interpretation of state statutes. These arguments have no merit and are not cognizable here.

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* The petitioner claims the contractor joins in the petition for certiorari (Br. p. 18). Of course this is nonsense since it was not a party below or even now listed as petitioner.

CONCLUSION

The petition for a writ of certiorari should be denied.

Dated: New York, New York, June 7, 1974.

Respectfully submitted,

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